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Brief of Crane for D.

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# In the Supreme Court of the United States,

**October Term, 1898.**

THE HOUSTON & TEXAS CENTRAL RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF TEXAS, DEFENDANT IN ERROR.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE FOURTH SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

## BRIEF OF DEFENDANT IN ERROR.

M. M. CRANE, Attorney-General,
Attorney for Defendant in Error.

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## BRIEF OF DEFENDANT IN ERROR.

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### STATEMENT.

This suit was instituted by the State of Texas, through its Attorney-General, in the District Court of Travis County, Texas, on the 5th day of December, 1894, alleging substantially the following facts:

1st. That the defendant company is incorporated under the general laws of the State of Texas.

2nd. Its general office and principal place of business is at Houston, Texas.

3rd. Its line of railroad runs into and through the county of Travis in the State of Texas.

4th. Its local agent at Austin, in said county, is H. D. Patrick.

5th. The State of Texas made loans under the provisions of an act entitled "An Act to provide for the investment of the special school fund in the bonds of railroads incorporated by the State,"

approved August 12th, 1856, to the Houston and Texas Central Railway Company, as follows:

On April 13, 1857, one hundred and fifty thousand dollars;
On October 28, 1857, sixty thousand dollars;
On May 21, 1858, sixty thousand dollars;
On July 6, 1858, thirty thousand dollars;
On February 23, 1859, thirty thousand dollars;
On June 15, 1859, thirty thousand dollars;
On July 22, 1859, thirty thousand dollars;
On August 2, 1859, thirty thousand dollars;
On August 20, 1859, thirty thousand dollars.

And said company executed and delivered to the State of Texas, in consideration of said loans, bonds as follows:

One dated March 25, 1857, for one hundred and fifty thousand dollars;
One dated September 22, 1857, for sixty thousand dollars;
One dated January 28, 1858, for thirty thousand dollars;
One dated February 23, 1858, for thirty thousand dollars;
One dated January 25, 1859, for thirty thousand dollars;
One dated May 14, 1859, for thirty thousand dollars;
One dated ....., 1859, for thirty thousand dollars;
One dated June 2, 1859, for thirty thousand dollars;
One dated July 29, 1859, for thirty thousand dollars.

Said bonds being to the effect that said company would pay to the State of Texas, at the office of its treasurer, in the city of Austin, ten years from the respective dates of said bonds, the said several sums of money; would pay each year two per cent. of said several sums as sinking fund, and would pay interest on each of them at the rate of six per centum per annum, and said bonds expressly acknowledging a lien created by the act aforesaid to secure payment of the loans made thereon.

By the loans aforesaid, and by the execution of said bonds, the said company promised and became liable to pay at the dates severally indicated the several sums of money (principal, interest and sinking fund) mentioned, and the State to secure payment of said sums became thereby invested with the lien aforesaid.

6th. The State of Texas made, under the provisions of the act aforesaid, and of an act approved January 28th, 1856, a loan to the Washington County Railroad Company on June 29th, 1859,

of sixty-six thousand dollars, and in consideration thereof the said company executed to the State its bond dated June 6th, 1859, to the effect that it would, ten years after the date thereof, pay to the State, at Austin, Texas, said sum, would pay, annually, two per cent. thereof as a sinking fund, and would pay interest thereon at the rate of six per cent. per annum, and acknowledging the lien created by the act aforesaid.

By the said loan and the bond aforesaid, the said company promised and became liable to pay the said sum at the time indicated and the said sinking fund and interest, and the State became invested with the lien aforesaid.

7th. That on or before the 15th day of August, A. D. 1870, the Washington County Railway became consolidated with and merged into the Houston and Texas Central Railway, and said Houston and Texas Central Railway Company thereafter had possession of and claimed the property which had theretofore belonged to the Washington County Railway Company.

8th. That the bonds aforesaid were not paid according to their tenor and effect, and the property upon which the lien aforesaid attached became liable to sale.

9th. That prior to the 15th day of August, 1870, the Houston and Texas Central Railway Company had constructed on its main line railroad as follows: A line of railroad completely constructed, beginning at the original terminus of said road, on the left bank of Buffalo Bayou, in the city of Houston, in Harris County, Texas, and running thence, in a general northwesterly direction, through the counties of Harris, Waller, Grimes, Brazos, Robertson, Falls and Limestone, including the 1st, 2nd, 3rd, 4th, 5th and 6th sections of twenty-five miles each, to a point one hundred and fifty miles to the place of beginning, about three miles south of Kosse, in Limestone County.

10th. That prior to the 15th day of August, 1870, the Washington County Railway Company, and the Houston and Texas Central Railway Company, had constructed of what is now known as the Western Branch of the Houston and Texas Central Railroad as follows: A line of railroad beginning at the point of junction of said Western Branch with the track of the main line of the Houston and Texas Central Railroad in the town of Hempstead, in Waller County; thence in a general westerly direction, through Waller and

Washington Counties for about twenty-one and one-quarter miles to a point in the town of Brenham, in Washington County.

11. That under the terms of said act of August 13th, 1856, and under the terms of the bonds aforesaid, a lien to secure payment of said bonds attached to all of said road, viz.: said one hundred and fifty miles of the main line of the Houston and Texas Central Railway, and twenty-one and one-quarter miles of the Western Branch thereof, and to all charter rights of said company or companies, including the road-bed, right of way, grading, bridges, iron rails, equipments and masonry, and to all stock subscribed for in said company or companies, and upon all depots and depot stations, all the property owned by said company or companies as necessary for their business.

12th. That on the first day of May, 1870, the aggregate amount due upon the bonds executed by the Houston and Texas Central Railway Company, principal and interest, was the sum of Six Hundred and Fifty-seven Thousand, Three Hundred and Twenty-four and 35-100ths Dollars ($657,324.35).

13th. That on the 1st day of May, 1870, the aggregate amount due upon the bonds executed by the Washington County Railway Company, principal and interest, was the sum of One Hundred and Three Thousand, Eight Hundred and Forty and 1-100 Dollars ($103,840.01).

14th. That the Houston and Texas Central Railway Company accepted the terms of the act of August 13th, 1870, entitled, "An Act for the relief of railroad companies indebted to the State for loans from the school fund," and thereby promised and became liable to pay, in addition to said sum of $657,324.35, and said sum of $103,840.01, semi-annually, on the 1st day of November and the 1st day of May of each year, six months' interest at six per cent. per annum on said aggregate amounts, and in addition thereto on said dates, a sinking fund of one per cent. of said amounts, in consideration of which promises the State by the terms of said law agreed not to make sale of the property upon which its lien existed as long as said payments were made.

15th. That thereafter to May 1st, 1879, said semi-annual interest and sinking fund was paid by the Houston and Texas Central Railway Company upon said sum of $103,840.01; but that no payment of principal or interest was made on November 1st, 1879, nor with-

in ten days thereafter, nor has any such payment been since made, and upon said failure to pay within ten days after the 1st day of November, A. D. 1879, the entire balance then remaining unpaid of said sum, amounting to $86,655.90, became at once due and payable.

16th. That up to and including the 1st day of May, 1893, the said semi-annual interest and one per cent. sinking fund was paid by said Houston and Texas Central Railway Company and defendant upon said sum of $657,324.35, but the next semi-annual interest and sinking fund was not paid, but the sum of $2,620 only was paid; the balance thereof was not paid, nor has it, or any part of it, since been paid; and upon said failure to pay within ten days after remaining then unpaid of said sum of $657,324.35, became at once due and payable.

17th. That upon said sum of $86,655.90, there had become due each six months from said 1st day of May, 1879, up to the present time, semi-annual interest at the rate of six per cent. per annum, and there is due upon each of said installments of unpaid interest, interest from the date upon which they respectively became due at the rate up to July 1st, 1891, of eight per cent., and since then of six per cent.

18th. That upon said sum of $411,935.84, there had become due upon May 1st, 1894, semi-annual interest at the rate of six per cent. per annum, and upon November 1st, 1894, a like amount, and since those dates upon said unpaid installments of interest at six per cent.

19th. That upon the 1st day of July, A. D. 1886, all the property of the Houston and Texas Central Railway Company, including the property upon which the State has the lien aforesaid, was sold judicially, and the purchaser and his associates formed under the laws of this State the corporation herein styled defendant.

20th. That said Washington County and Houston and Texas Central Railway Companies are defunct; that their corporate existence has been terminated; that neither of them has a president, directors, or other officers or stockholders, or other representatives, upon whom service may be had, and that there is no way of bringing said defunct corporations before this court.

21st. That the Houston and Texas Central Railroad Company, defendant, claims as the legal owner (subject to the lien heretofore

mentioned) and is in possession of all the property upon which the lien above set forth exists.

22nd. Plaintiff prays that judgment be given it, that there is due upon the obligations aforesaid the sums of money heretofore stated, with interest as set forth, and that payment thereof is secured by the liens on the property aforesaid; that said property be sold as under execution, and that the proceeds be applied to the payment of said sums with interest, and for costs; and that it have other relief, including the appointment of a receiver, as in the premises should be given.

To this defendant answered on the 6th day of February, 1895, and on May 15th, 1895, filed its first amended original answer, setting up the payment of certain amounts during the war between the States, in State treasury warrants, in addition to certain large cash payments therein pleaded.

On November 16th, 1895, appellee filed its first supplemental petition. This was subsequently amended on the 16th day of January, 1896. The amended supplemental petition consisted of demurrers and special pleas, setting up—

1. That the money borrowed by the railroad company constituted a part of the special school fund of the State of Texas, which had been previously appropriated as a permanent fund for the support of the public free schools, and that to permit these payments in worthless warrants, or anything else than money, would be a diversion of that school fund, and was therefore in contravention of Sec. 2, Art. X, of the Constitution of 1845, and as amended in 1861.

2. That the treasury warrants so issued were issued for the purpose of being circulated as money, and that they were so circulated and used by the State officers; that they were therefore void because in contravention of Sec. 8, Art. VII, of the Constitution of the State of Texas then in existence.

3. Because the said warrants so issued constituted bills of credit, within the meaning of Section 10, Article I, of the Constitution of the United States; and they were therefore void because said section of the Constitution prohibited their issuance by the States.

4. Because the acts of the Legislature authorizing the issuance of said treasury warrants, and the history of the times, show that they were issued for the purpose of aiding the then authorities of the State of Texas in prosecuting a war and rebellion against the

government of the United States; and that they were issued for the purpose of aiding the State in prosecuting said war and rebellion.

5. Because the people in the Constitutional Convention, assembled in 1866, by ordinance, declared all said warrants in which said pretended payments were made, to be utterly void and of no effect. And further, because Article XII, Section 36, of the Constitution of 1869, reiterated and repeated the same declaration.

6. That said warrants in which said payments were made were utterly worthless.

7. That said payments had been disallowed in 1870 by the then officers of the State, of which defendant had ample notice.

Plaintiff prayed that no credit be allowed by reason of the payments in said warrants, and if allowed, that they be allowed only to the extent of the market value of said warrants when paid to the State. (Tr., p. )

On the 16th of November, 1895, defendant filed its application, accompanied by bond, for the removal of the cause into the Circuit Court of the United States for the Western District of Texas, alleging in substance that the cause of action was one arising under the Constitution and laws of the United States. The application was denied. (Tr., p. )

All of the demurrers were overruled by the court, the case tried, and resulted in a judgment for the plaintiff for the sum of $673,-109.56, together with all costs of suit, and with a foreclosure of the lien mentioned in the petition, upon all of the property of the defendant. (Tr., p. )

## STATEMENT OF UNCONTESTED FACTS.

As is shown by the statement of uncontested facts in appellant's brief, the following facts were established on the trial of the case:

1st. It was admitted by the defendant that the State of Texas made to the Houston and Texas Central Railway Company, and to the Washington County Railroad Company respectively, under the provisions of the act entitled "An Act to provide for the investment of the special school fund in bonds of railroads incorporated by the State," and approved August 13th, 1856, loans in the amount, and at the dates set forth in plaintiff's original petition, and that said companies executed and delivered to the State of Texas on the

dates and in the amounts set forth in said petition, the bonds described in the petition, in consideration of said loans.

2nd. It was admitted also that on or about the 15th day of August, 1870, the Washington County Railroad Company became consolidated with and merged into the Houston and Texas Central Railway Company, and that the said Houston and Texas Central Railway Company thereafter had possession of and claimed the property which had theretofore belonged to the Washington County Railroad Company. (Tr., pp. )

3rd. It was also shown that the appellant, the Houston and Texas Central Railroad Company, was incorporated under the general laws of the State of Texas by filing articles of incorporation in the office of the Secretary of State on the 1st day of August, 1889, by F. P. Olcott and his associates, the purchasers of the railroad and corporate rights and franchises of the Houston and Texas Central Railway Campany, including the Washington County Railroad, at the judicial sale thereof. (Tr., pp. )

4th. It was also admitted in connection with the introduction of the articles of incorporation of the defendant company that said company had been organized and was now existing under and by virtue of such articles of incorporation and at the time of the institution of this suit was in possession and claiming by proper deeds of conveyance from F. P. Olcott, and on such charter owned and operated the railroad and property described in plaintiff's original petition.

5th. It was also admitted by defendant in open court that all payments made on account of the loan to the Washington County Railroad Company after that company was merged into the Houston and Texas Central Railway Company in 1870, up to the time that such payments on account of the loan to the Washington County Railroad Company were discontinued in 1879, were made by the Houston and Texas Central Railway Company, and that all payments on account of the loan to the Houston and Texas Central Railway Company that were made after February, 1885, and prior to April, 1893, were made by the receiver of the property and affairs of said railway company; and that all the payments on account of said loan paid subsepuent to April 1st, 1893, were made by the Houston and Texas Central Railroad Company, the defendant in this case.

6th. It was shown, as stated by appellant in his brief, that the payments made in treasury warrants as averred by it, were accepted by the Comptroller and Treasurer of the State, and that credit was at the time duly given by the Comptroller on the books of his department; but in that connection it should be stated that said credits were soon thereafter repudiated, and that the State authorities have never since admitted that they were proper credits, but on the contrary have insisted that said payments were void, and should be disregarded. (Tr., p. )

7th. It was also shown that the Washington County Railroad Company had no officers, and no one upon whom service could be had. (Tr., p. 230.)

8th. It was shown that all of the property of the Washington County Railroad Company after it had been merged into the Houston and Texas Central Railway Company in 1870, was operated by the latter company until its property and affairs had passed into the hands of a receiver in 1885; and it was operated by said receivers until April 10th, 1893, and passed with the other lines of the Houston and Texas Central Railway Company to F. P. Olcott, by a foreclosure sale in 1888, and from Olcott to this defendant, organized and incorporated under articles of incorporation filed August 1st, 1889. (Tr., p. )

9th. It was also proven that the Governor had given authority to the Attorney-General to institute this suit. (Tr., p. )

The defendant in the court below pleaded various payments in cash and also certain payments made in treasury warrants, alleged to have been issued by the State of Texas. The facts charged in the original petition, that is to say, the lending of the money and the execution of the bonds, were admitted by the defendant. (See Rec., p. .)

There was no contest made over the cash payments, and, indeed, there was no contest over the fact of the delivery of the treasury warrants to the proper officers of the State, as alleged in the defendant's answer, but the State, by a supplemental petition, charged that these warrants were void for various reasons.

FIRST.—*Because they were issued for the purpose of being circulated as money in contravention of Section 8, Article VII, of*

*the State Constitution of 1845.* So much thereof as is applicable reads as follows:

"And in no case shall the Legislature have power to issue treasury warrants, treasury notes, or paper of any description intended to circulate as money." (Sayles' Texas Statutes, Vol. 4, p. 208.)

In 1861, in the effort to make secession successful, the State Constitution was amended so as to conform to the general purpose manifested by the Secession Convention. In this Constitution, however, Section 8, Article VII, was carried forward without any change. The portion of the section in point of the Constitution as amended in 1861 reads as follows:

"And in no case shall the Legislature have the power to issue treasury warrants, treasury notes, or paper of any description intended to circulate as money." (Sayles' Texas Statutes, Vol. 4, p. 345.)

SECOND.—*Because they were bills of credit, prohibited by Sec. 10, Art. I, of the Federal Constitution.*

THIRD.—*Because they were issued in aid of the rebellion.*

FOURTH.—*Because the railroads were enabled to purchase them in the market for a nominal, insignificant and trifling sum, and sought to compel the State to take them at par.*

That as soon as peace was restored, the acceptance of these depreciated warrants in payment of debts justly owing by the railroad companies was immediately repudiated by the lawful officers of the State of Texas, and that ever since said date of said repudiation the State has maintained that said payments were illegal and unlawful, of which said fact the defendant company had ample and abundant notice.

On the filing of this supplemental petition, or soon thereafter, the defendant company filed a motion to remove the cause to the Federal Court, accompanied by proper bond. The motion was denied. (Record, p. ) Trial resulted in a judgment for the plaintiff in the sum of six hundred seventy-three thousand one hundred and nine dollars and fifty-six cents ($673,109.56), and a foreclosure of the lien on the property of the railroad company. The plaintiff in error company perfected an appeal to the Court of Civil Appeals for the Third Supreme Judicial District of the State of Texas. The case was by that court reformed and affirmed. The

Court of Civil Appeals found as a fact that the warrants in which the payments were made were issued during the war and for the purpose of being circulated as money. That tribunal also found that as a matter of law they were void because issued in violation of Section 8, Article VII, of the State Constitution, which prohibited warrants being issued for that purpose. That therefore it must be judicially treated as if no warrants had ever been issued at all because a void warrant was equivalent to no warrant, and therefore no warrants were ever paid to the State because void warrants cannot be given any validity. The portion of the opinion of the Court of Civil Appeals dealing with this subject reads as follows:

"The second and principal question which arises is whether the payments made by the railway company in State treasury warrants are valid and binding upon the State. This question presents really the only controversy between the parties. Section 8, Article 7, of the Constitution of 1845 states that in no case shall the legislature have power to issue treasury warrants, treasury notes, or paper of any description intended to circulate as money. The warrants which were paid upon the obligations due the State were issued under acts of the legislature of the State when that provision of the Constitution was in force. The various acts of the legislature of the State during the period of the war concerning the State revenues, its indebtedness and liabilities, and providing for the issuance of State warrants and the purpose for which they could be used, and the amount for which they could be issued, together with the size, shape and color of the warrants issued, and the small amounts in which warrants were issued, together with the history of the times and the well known depleted condition of the treasury during that period, together with the scarcity of existing, reliable and available circulating medium as money, convinces us that it was the purpose of the various acts of the legislature during that time to give to the warrants issued during that period, as much as possible, a standing and character as money. The scarcity of money and the necessities of the State and the public were evidently inducements to the legislature sitting during this period to provide uses to which warrants might be put in the way of requiring State officers and authorizing railways to receive them in payment of debts due them. The evident purpose was to give to the warrants in certain instances a debt-paying power in order that they might be given an advanced value and might be used in some respects as money. When the warrants were issued it was not expected and intended that they should be immediately paid, for the State was not then in a condition to pay them, nor was the intention solely that they should serve the legal purpose of evidences of debt against the State. But the character of legislation during the period during the war clearly indicates that the purpose was to give to these warrants the added quality of money as far as it lay in the power of the legislature to accomplish that result. To set out all the acts of the legislature bearing upon this subject, together with all the facts which we have considered in connection therewith, with the well known matters of history relating thereto would unnecessarily prolong this opinion. Therefore, we close this branch of the case with the statement that *in our opinion the war-*

*rants of the State issued during the period of the war, after January 1, 1862, were intended to be used and circulated as money,* and in this connection it is well to say that we are of the opinion from all there is shown from the record that the payments made by the railway companies upon the obligations sued upon were in warrants issued *after the time we have declared they were intended to circulate as money.* What is said in this connection relieves us from passing upon the interesting questions upon the burden of proof with reference to the alleged payments." (40 S. W. Rep., 1099-1101.)

A writ of error was applied for to the Supreme Court of the State and was refused, and the case was brought to this court by writ of error.

Motion to dismiss writ of error for want of jurisdiction has been made.

The plaintiffs have made numerous assignments of error, but really, there are but few questions involved in the record. They may safely be considered under the following heads:

1. The claim that error was committed in denying the motion to remove the cause to the Federal Court.

2. In holding that the warrants in which the payments were made were invalid because issued in violation of Section 8, Article VII, of the State Constitution of 1845.

Dissenting from all the propositions made by plaintiffs in error, a copy of whose brief has not been furnished State's counsel, the following counter-propositions are submitted:

DEFENDANT'S IN ERROR FIRST COUNTER-PROPOSITION.

*The statement of plaintiff's claim or cause of action in the original petition discloses no Federal question. The cause was, therefore, not removable to the Federal Court.*

STATEMENT.

Plaintiff's s atement of its cause of action is contained in the original petition. (R., p. .) The original petition discloses that it was an action for debt created by loaning money to the railroad corporations therein named, which indebtedness was evidenced by bonds fully described therein, and to secure which a lien was given upon the property therein mentioned. It was simply a foreclosure proceeding without even the suggestion of a Federal question.

AUTHORITIES.

*Tennessee vs. Bank, 152 U. S., 455-464.*
*Chappell vs. Waterworth, 155 U. S., 102.*
*P. T. C. Company vs. Alabama, 155 U. S., 487.*
*East Lake Co. vs. Brown, 155 U. S., 488.*
*Galveston, Harrisburg and San Antonio Railway Co. vs. Texas, 170 U. S., 226.*

ARGUMENT.

The rules of pleading adopted by the Texas courts require the plaintiff's claim or cause of action to be stated in the original petition, or the amended original petition, which is a complete instrument itself. Replication to defensive matter must be made in a supplemental petition. A supplemental petition is, in the strictest sense, a replication, as the following rules prescribed by the Supreme Court of the State will disclose.

"THE PETITION.

"3. The petition of the plaintiff shall consist of an original petition and such supplemental petitions as may be necessary in the course of pleading by the parties to the suit, to enable the plaintiff to state all the facts presenting his cause of action, and such other facts as may be required to rebut the facts that may be set up in the original or supplemental answer, as pleaded by the defendant. The original petitions and the supplemental petitions shall be indorsed so as to show their respective positions in the process of pleading, as "original petition," "plaintiff's first supplemental petition," "plaintiff's second supplemental petition," and so on, to be successively numbered, named and indorsed.

"ORIGINAL PETITION.

"4. The plaintiff, in the original petition, in addition to the names and residences of the parties and the relief sought, may state all of his facts so as to present together different combinations of facts, amounting to a cause or causes of action, as has been the usual practice, or he may state the cause or causes of action in several different counts, each within itself presenting a combination of facts specifically amounting to a single cause of action, which, when so drawn, shall be numbered, so that an issue may be formed by each one by the answer.

"PLAINTIFF'S SUPPLEMENTAL PETITION.

"5. The plaintiff's suplemental petition may contain exceptions, general denial, and the allegations of new facts not before alleged by him, in reply to those which have been alleged by the defendant." (*Rules 3, 4 and 5, 84 Texas, 708.*)

These rules are recognized by the following authorities:

*Grabenheimer vs. Blum, 63 Texas, 369-373.*

*Insurance Company vs. Camp, 64 Texas, 521-525.*

An analysis of the above rules will show that every allegation necessary to support a judgment or decree in favor of the State must be made in the original petition. It will be seen that the original petition in this case complied with those rules. If the defendant company had plead only a general denial a judgment would have been obtained against it by proving the statements made in the petition. To avoid the case thus made it became necessary for the defendant company to specially plead payment.

*Cartright vs. Jones, 13 Texas, 4.*

*Gray vs. McFarland, 29 Texas, 169.*

This rule the defendant company recognized, and pleading payments, it assumed the burden of proving them. Plaintiff's supplemental petition was a reply to this plea of payments. It could not be said to contain, in any sense, a statement of the plaintiff's claim or cause of action; indeed, the claim or cause of action, as stated in the original petition was admitted on the trial, it being admitted that the plaintiff in error, and the Washington County Railroad Company, whose line of road plaintiff in error had absorbed, had borrowed the special school fund and executed their bonds therefor as charged in the plaintiff's original petition. (Rec., p. )

It was proven on the trial that the Houston and Texas Central Railroad Company took the property of the Washington County Railroad Company subject to the State's lien thereon. (Rec., p. )

The bonds, the execution and delivery of which were charged in said petition, expressly acknowledged the existence of a lien created by the mortgage to secure the payments of the loans made thereunder. It is plain, therefore, that the supplemental petition complied with the rules in that it was, in the strictest sense, a reply to the defenses pleaded, and contained no part of the statement of the plaintiff's cause of action. There was, therefore, no error in denying the motion to remove.

SECOND COUNTER-PROPOSITION OF DEFENDANT IN ERROR.

*This court has no jurisdiction of the subject matter of this case*

*for the reason that the decision of the State court was based upon one conclusion of fact and one conclusion of law, the conclusion of fact being that the warrants in which the payments were made were issued during the war for the purpose of being circulated as money; and the conclusion of law being that they were issued in violation of Section 8, Article VII, of the State Constitution, and were therefore void.* (R. )

STATEMENT.

The Court of Civil Appeals in deciding this case said:

"The second and principal question which arises is whether the payment made by the railway company in State treasury warrants are valid and binding upon the State. This question presents really the only controversy between the parties. Section 8, Article 7, of the Constitution of 1845, states that in no case shall the legislature have power to issue treasury warrants, treasury notes, or paper of any description intended to circulate as money. The warrants which were paid upon the obligations due the State were issued under acts of the legislature of the State when that provision of the Constitution was in force. The various acts of the legislature of the State during the period of the war concerning the State revenues, its indebtedness and liabilities, and providing for the issuance of State warrants and the purpose for which they could be used, and the amounts for which they could be issued, together with the size, shape and color of the warrants issued, and the small amounts in which warrants were issued, together with the history of the times and the well known depleted condition of the treasury during that period, together with the scarcity of existing, reliable and available circulating medium as money, convinces us that it was the purpose of the various acts of the legislature during that time to give to the warrants issued during that period, as much as possible, a standing and character as money. The scarcity of money and the necessities of the State and the public were evidently inducements to the legislature sitting during this period to provide uses to which warrants might be put in the way of requiring State officers and authorizing railways to receive them in payment of debts due them. The evident purpose was to give to the warrants in certain instances a debt-paying power in order that they might be given an advanced value and might be used in some respects as money. When the warrants were issued it was not expected and intended that they should be immediately paid, for the State was not then in a condition to pay them, nor was the intention solely that they should serve the legal purpose of evidence of debt against the State. But the character of legislation during the period during the war clearly indicates that the purpose was to give to these warrants the added quality of money as far as it lay in the power of the legislature to accomplish that result. To set out all the acts of the legislature bearing upon this subject, together with all the facts which we have considered in connection therewith, with the well known matters of history relating thereto would unnecessarily prolong this opinion. Therefore, we close this branch of the case with the statement that *in our opinion the warrants of the State issued during the period of the war, after January 1, 1862, were intended*

*to be used and circulated as money*, and in this connection it is well to say that we are of the opinion from all there is shown from the record that the payments made by the railway companies upon the obligations sued upon were in warrants issued *after the time we have declared they were intended to circulate as money*. What is said in this connection relieves us from passing upon the interesting questions upon the burden of proof with reference to the alleged payments."

ARGUMENT.

It will be noted that in the above decision the court did not pass on any Federal question.

THIRD COUNTER-PROPOSITION OF DEFENDANT IN ERROR.

*The decision of the Court of Civil Appeals on the question of fact involved in the record to the effect that the warrants in question were issued during the war between the States and for the purpose of being circulated as money is conclusive on this court.*

AUTHORITIES.

*Egan vs. Hart, 165 U. S., 188.*
*Backus vs. Fourth Street Depot Co., 169 U. S., 557.*
*Halloway vs. Dunham, 18 Sup. Rep., 184.*
*Harrison vs. Perea, 168 U. S., 311.*

FOURTH COUNTER-PROPOSITION OF DEFENDANT IN ERROR.

*The warrants in which the payments were made, issued for the purposes above named, that is, for the purpose of being circulated as money, the Court of Civil Appeals held to be void because in contravention of Section 8, Article VII of the State's Constitution, and that decision is conclusive on this court and not open to review.*

AUTHORITIES.

*Long Island Water Supply Co. vs. Brooklyn, 166 U. S., 685.*
*Merchants and Manufacturer's Bank vs. Penn., 167 U. S., 181.*
*Backus vs. Fourth Street Depot Company, 169 U. S., 557.*
*Chicago, etc., Ry. Co. vs. Minnesota, 134 U. S., 418.*

ARGUMENT.

No Federal question having been decided, there is nothing for

this court to review, and the writ of error ought to be dismissed. Had the Court of Civil Appeals held that the warrants in question were issued in violation of the Federal Constitution, as well as in violation of the State Constitution, this court would not, under the authorities above cited, be authorized to assume jurisdiction, because the decision would then rest on two grounds, one of which would be a construction of the State Constitution, the other a construction of the Federal Constitution., The construction of the State Constitution is sufficiently broad, and on it the decision could, even in that event, be fairly rested. Had the court so decided, it would not change the result to ascertain that the court was wrong in its sonstruction of the Federal Constitution, because its construction of the State Constitution is not open to review, and that construction controls the result of the case.

AUTHORITIES.

This rule will be adhered to although the court may believe that the decision by the State court of the Federal question was erroneous.

*Klinger vs. Missouri, 13 Wall., 257.*

But, as before suggested, the court having rested the decision entirely on the State Constitution, this court is without jurisdiction. But if the court takes jurisdiction of this case and undertakes to determine the questions involved, then it is respectfully submitted that there was no error in the findings of the court below on both questions of law and fact. The court found that the warrants in which the payments were made were issued after January 1st, 1862, and that they were issued for the purpose of being circulated as money, and on this subject we make the following additional counter-propositions:

FIFTH COUNTER-PROPOSITION OF DEFENDANT IN ERROR.

*The record conclusively shows that the warrants in which*

*the payments were made were issued during the war between the States and after January 10th, 1862. As the statement of the nature of the suit indicates, this was a suit by the State for debt and foreclosure of a lien on the railroad property. The defendant answered by plea of payment in cash and treasury warrants. (R. ) It was agreed that the indebtedness existed as charged in the original petition. Plaintiff, by supplemental petition, alleged that the warrants in which the payments were made were void because issued during the war, and that they were void, among other reasons, 1st, because they were issued for the purpose of being circulated as money, in violation of the provisions of the State Constitution; 2nd, because they were bills of credit, the issuance of which was prohibited by the Federal Constitution, and 3rd, because they were issued in aid of the rebellion.*

STATEMENT.

To establish the plea of payment certified copies from the Comptroller's record, showing the payments in treasury warrants, were made, as plead. (R. ). The proof offered by the applicant, however, did not show the character, dates, or denominations of the warrants in which the payments were made. The State offered a transcript from the Comptroller's record showing that at divers dates during the war, and particularly on the 28th day of February, 1865, and the 31st day of May, 1865, there was on hand in the State Treasury warrants which the record recited were paid by the railroad companies on principal and interest due the school fund amounting to more than $320,000 (R. ). $287,812.93 of these warrants were payable in 8 per cent. bonds, while $32,554.20 were payable in six per cent. bonds. The warrants in which these payments were made being fundable in these two classes of securities, can be easily identified. The same pages of the record showing these payments in Treasury warrants that were on hand in the State Treasury disclose that there was in the State Treasury at the same time $11,239.71 in interest bearing warrants. A necessary inquiry then is, by what authority were the interest bearing warrants issued? By what authority were certain of those warrants fundable in 8 per cent. bonds? and by what authority in 6 per cent. bonds? Taking these questions in the order presented, they can be easily answered. In the acts of the Texas Legislature

of 1860, on pages 115 and 116, a provision was made for the issuance of interest bearing warrants. It reads as follows:

"When an account shall hereafter be presented for payment for which an appropriation has been made, it shall be the duty of the comptroller to audit and allow the claim if legal, and to issue his warrant for the amount, and if there be no money in the treasury to pay the demand, then the comptroller shall issue his warrant upon the treasurer for the amount with ten per cent. per annum interest * * which warants shall be signed by the governor, and shall be endorsed by the treasurer.

"Sec. 2. That it shall be made the duty of the comptroller, on the first day of July, 1860, and every six months thereafter, to advertise in three papers in different parts of the State for the presentment of any such warrants as are mentioned in the first section of this act in the order of their dates and numbers, and after the expiration of sixty days from such notice, said warrants not presented shall cease to draw interest. *Said warrants shall not circulate as money, but may be assigned.*

"Sec. 3. That this act shall take effect and be in force from and after passage."

Approved February 14th, 1860.

It may be safely assumed that all warrants issued by Texas subsequent to the date of this Act and before its repeal, bore interest at the rate of 10 per cent. per annum. It must also be apparent that very few of these warrants were issued, because in May, 1865, there were less than $12,000 of them in existence, and they are not classed among the warrants in which any payments were made on the school fund. The Act authorizing the issuance of these interest bearing warrants was repealed on the 10th day of January, 1862, and in the following language:

"Section 1. Be it enacted by the Legislature of the State of Texas: That an act authorizing unpaid warrants to bear interest, approved February 14th, 1860, is hereby repealed, but without prejudice to the vested rights of the owners of such warrants, which shall be available as if said act were not repealed.

"Sec. 2. The comptroller, on presentation of any warrant bearing interest, as well as the presentation of any other legal claim for which an appropriation shall have been made, shall draw on the treasury as heretofore prescribed by law, and payment shall be made thereon if there be money therefor in the treasury, but if not the comptroller shall issue one or more warrants for the amount that may be due and payable to the party entitled to payment, or bearer, and said warrants shall be of such proportions of the claim as may be expressly required by the holder; provided, that not more that one-tenth of the whole amount may be issued in warrants of one dollar each, and the balance of five dollars or more each, and said warrants shall be endorsed by the treasurer, and every interest bearing warrant that is superceded shall be cancancelled by the comptroller.

"Sec. 3. The warrants issued in pursuance of this act on presentation at the treasury shall be paid out of any money therein not otherwise appropriated, and when paid shall be cancelled, and shall not be re-issued.

"Sec. 4. That this act take effect and be in force from and after its passage."

Approved January 10th, 1862. *(Acts of 1862, page 34.)*

It will be seen by this last quoted act that these non-interest bearing warrants were authorized to be issued on the 10th day of January, 1862.

On April 8th, 1861, the Texas Legislature passed a war measure which reads as follows:

"An act authorizing a loan and imposing a specific tax to meet the principal and interest thereof, under the provisions of the 33rd section of the 7th article of the Constitution of the State.

"Section 1. Be it enacted by the Legislature of the State of Texas: That the governor of the State shall cause to be executed the bonds of the State for the sum of one million of dollars in sums of one thousand dollars each, redeemable in sixteen years, and bearing interest at the rate of eight per centum per annum, payable semi-annually; with coupons for the semi-annual interest attached, payable on the first day of July and the first of January of each year. The bonds shall be signed by the governor and treasurer, and shall be registered by the comptroller, who shall certify the fact of such registration on the back of the bonds, and the coupons shall be signed by the treasurer. The bonds and coupons shall be payable at some bank in the city of New Orleans, in the State of Louisiana.

"Sec. 2. The governor shall appoint an agent to negotiate the sale of said bonds from time to time, and to place the proceeds of such sales in some bank in the city of New Orleans to be subject to the order of the Comptroller of the State, and by him to be placed in the State treasury. Said agent shall be governed in his negotiations by the instructions of the governor.

"Sec. 3. The proceeds of sales of said bonds shall be applied to the following objects and no other purpose whatever: To the payment of all indebtedness of the State created for the defense of the frontier, and to the payment of appropriations which have been or may hereafter be made for the military defense of the State. To the repayment of all the disbursements made from the treasury or anticipated from the accruing revenue of the State, or from any special fund or funds in the State treasury to meet the appropriations to pay the expenses of the State Convention, and of the extra and adjourned sessions of the Eighth Legislature.

"To the payment of all appropriations made to meet the debts created or incurred by authority of the State convention, and to meet any deficit in appropriations made to meet the expenses of said convention, and of the expenses of the extra and adjourned sessions of the Eighth Legislature.

"To the payment of any deficit in the appropriations made to meet the ordinary expenses of the government for the year 1861, arising from the anticipation of the revenue to meet extraordinary demands.

"Sec. 4. There shall be levied and collected, to pay the interest on said bonds as they fall due, and to pay and discharge the principal thereof, a specific, direct annual ad valorem tax of four cents upon each hundred dollars value

of property, real and personal, in this State (except such property as is now exempt by law from taxation), which tax shall be levied and collected by the same persons, and at the same time and in the same manner as is or may hereafter be provided by law for the collection of the direct ad valorem State tax, to meet the ordinary expenses of the State government, and all laws now or which may be hereafter in force in this State for the levying and collection of other direct State taxes for the use of the State, shall also apply to the levying and collection of the specific direct annual ad valorem tax of four cents upon each hundred dollars value of property, real and personal, as authorized by this act. No part of the specific tax authorized by this section shall be appropriated to any other purpose whatever, but exclusively to the payment of the principal and interest of the loan specified in this act.

"Sec. 5. For the payment of the principal and interest of said bonds, the faith of this State is pledged, in addition to the specific tax herein specified and pledged.

"Sec. 6. The specific tax imposed by this act shall remain in force and be irrepealable, and be annually collected, until the proceeds thereof shall have made full provision to pay and discharge the principal and interest of the bonds provided by this act. Provided, that whenever the State shall have retired and cancelled one-fourth of this issue of one million dollars of bonds, it shall be the duty of the Comptroller of this State to decrease the specific tax herein provided for one cent on the one hundred dollars of the value of the real and personal property assessed; and upon the retiring of each additional sum of two hundred and fifty thousand dollars of this issue of bonds, one cent on the one hundred dollars of said specific tax shall be taken off.

"Sec. 7. The money realized by the specific tax provided for in this act shall be applied first to the payment of the interest coupons maturing upon this issue of bonds, and the residue shall be deposited in the State treasury, and constitute a special sinking fund for the redemption of the principal of said bonds.

"Whenever fifty thousand dollars of said sinking fund shall have accumulated in the treasury, it shall be the duty of the governor to cause the comptroller and treasurer to invest said amount in the redemption of said bonds. For which purpose the comptroller shall give thirty days' notice by publication in one newspaper printed in the city of New Orleans, and one in the city of Austin, that he will redeem or purchase said amount of bonds from the lowest bidder, and he shall receive sealed proposals therefor, to be opened by him in the presence of the governor and treasurer, and they shall redeem the bonds offered at the lowest rate. Provided, that in no instance shall said officers pay a higher rate for said bonds than ten per centum premium on their par value; and further provided, that in case they can not be purchased at a rate within the limits aforesaid, then the said officers may invest said sinking fund in the bonds of the Confederate States of America; provided, they can be obtained within the same limits as to price. And said Federal bonds shall be placed in said special sinking fund.

"Sec. 8. The plate upon which the bonds are engraved shall be returned to the governor and comptroller, with the bonds, and shall be by them destroyed.

"The agent appointed by the governor for the purpose herein contemplated, may be allowed such reasonable compensation for his services as shall be agreed upon and established by the governor, comptroller and treasurer, or a majority of them.

"Sec. 9. Five thousand dollars, or so much thereof as may be necessary,

is hereby appropriated to defray the expenses incurred in carrying out this act. act.

"Sec. 10. The specific tax provided for by this act shall be imposed on the assessments of the present year.

"Sec. 11. That this act take effect and be in force from and after its passage."

Approved April 8th, 1861.

This Act, it will be noted, authorized the issuance of $1,000,000 worth of bonds in sums of $1,000 each bearing interest *at the rate of eight per cent. per annum.*

The 33rd section of the Act was amended on January 11th, 1862. The amendment reads as follows:

"An act to amend the second and third sections of an act entitled 'An act authorizing a loan and imposing a specific tax to meet the principal and interest thereof, under the provisions of the 33rd section of the 7th article of the Constitution of the State.' Approved April 8th, 1861, and supplementary to said act.

"Whereas, no bonds have been issued or negotiated under the provisions of the act recited in the caption hereof,—therefore—

"Section 1. Be it enacted by the Legislature of the State of Texas: That the second section of said act recited in the caption hereof is hereby amended so that the same shall hereafter read as follows, viz:

"'The governor, comptroller and treasurer, or a majority of them, may, in their discretion, appoint an agent or agents to negotiate the disposition or sale of said bonds from time to time; and in case the bonds are sold for money the proceeds of such sales shall be placed in some bank in the city of New Orleans subject to the orders or drafts of the comptroller of the State for State purposes, or shall be paid into the State treasury at Austin, as shall be directed by the authority appointing such agent or agents. All agents appointed under the provisions of this act shall be governed in their negotiations by the instructions of the authority appointing them; and the governor, comptroller and treasurer, or a majority of them, may, without the interposition of any agent, negotiate the disposition or sale of said bonds for the purposes of this act.

"Sec. 2. The third section of said act recited in the caption hereof, is hereby amended so that the same shall hereafter read as follows, viz:

"The said bonds, or the proceeds of the sale thereof, shall be applied to the following objects and no other purpose whatever:

"1st. To the satisfaction or payment of appropriations which have been or may hereafter be made for the purchase of arms and munitions of war, or for the manufacture of arms and ordnance.

"2nd. To the satisfaction and payment of all indebtedness incurred by the State convention or under its authority, and to meet any deficit in appropriations made to meet the expenses of said convention, in case said bonds can be so used.

"3rd. To the funding of any indebtedness of the State, present or future, to the payment of all indebtedness of the State created for the defense of the frontier, and to the payment of appropriations which have been or may here-

after be made for the military defense of the State. To the payment of all disbursements made from the treasury or anticipated from the accruing revenues of the State, or from any special fund or funds in the State treasury to meet appropriations to pay the expenses of the State convention, and of the extra and adjourned sessions of the legislature. To the payment of any deficit in the appropriations made to meet the ordinary expenses of the government for the year 1861, arising from the anticipation of the revenues to meet extraordinary demands.

"Sec. 3. The bonds and coupons authorized by said act shall be payable at some bank in the city of New Orleans, in the State of Louisiana, or at the treasury of the State, at the option of the holder of the same; and in case any such holder shall elect to receive such payment at the treasury of the State he shall give notice thereof in writing to the treasurer of the State thirty days before the maturity of such bond or coupon. The tax assessed under and by virtue of said act shall be collected in gold or silver only, any law to the contrary notwithstanding. And this act shall be in force from and after its passage."

Approved January 11th, 1862. *See Acts of 1862, page 42.*

The 3rd subdivision of this last named act makes provision for the funding indebtedness of the State, present and future. This was supplemented on the 13th day of January, 1862, by an act which reads as follows:

"An act to authorize and regulate funding and loan bonds.

"Section 1. Be it enacted by the Legislature of the State of Texas: That any audited indebtedness of the State shall be receivable in payment for its loan bonds.

"Sec. 2. Any indebtedness of the State for any special fund which has been or may be used by the State under any law shall be substituted as far as practicable by loan bonds of the State which shall inure to the benefit of the interest entitled to such funds until it shall be reimbursed and the bonds be thereby re-purchased when they shall be subject to re-sale as if they had never been so used, and such adjustment shall be made by the governor, comptroller and treasurer acting by a majority."

*See Acts of 1862, page 40.*

It will be seen that the Act of April 8th, 1861, providing for the issuance of bonds bearing 8 per cent. interest authorized no indebtedness to be funded therein, but provision was made for the funding indebtedness on the 11th day of January following, by the acts passed respectively on January 11th, 1862, and January 13th, 1862. The Act of January 11th, 1862, authorized the funding of all indebtedness of the State, *present and future.* The fact that in 1865 there could not be found in the State Treasury but little more than $11,000 in interest bearing warrants shows that there could not have been such indebtedness prior to 1862, because

all unpaid appropriations were to be covered by interest bearing warrants, and in 1862 that law was repealed. And in 1865, only five years later, it was seen that there was $320,000 worth of the other warrants, the non-interest bearing warrants being fundable in the bonds of the character heretofore mentioned, in the State Treasury, all of which had been paid on the school fund indebtedness—that is the indebtedness now in question. But it is plain that the executive officers at the time did not understand that the interest bearing bonds, issued under the Act of 1860, were fundable in any kind of bonds. The entry of the amount of interest bearing warrants on hand is made in one item. The entry of the warrants fundable in 8 per cent. bonds in another item, and those in six per cent bonds in still another item. So that we are informed by the executive construction given at the time that the 10 per cent. warrants were not included in the indebtedness which was fundable. But apart from this executive construction it is reasonable to suppose that Texas had no outstanding warrants in December, 1863, which were issued before the war. The language of the first funding act leaves no room for doubt on that point. The provision of that act is that these bonds, or the proceeds of the sale thereof, shall be applied to the funding of any indebtedness of the State, *present* or *future*, but not past indebtedness.

The Act of the 13th of January, 1862, above quoted, provides that any audited claim shall be funded in these bonds. Its second section declares that any indebtedness of the State for any special fund "which has or may be hereafter used by the State under any law shall be substituted so far as practicable by loan bonds of the State which shall inure to the benefit of such fund until it shall be reimbursed and the bonds shall be purchased." The meaning of "audited claims" mentioned in the first section of the act is fully explained by the Act of January 4th, 1862, which reads as follows:

"Section 1. Be it enacted by the Legislature of the State of Texas: That the comptroller of public accounts be and he is hereby authorized and required to audit and settle the claims of the officers and privates of all volunteer companies ordered out by the governor or committee of safety, acting by authority of the People's convention for and during the term of service actually rendered to the State according to the rules of the Confederate States for the government of the army thereof, upon the return of the muster roll of the company to the comptroller duly authenticated; and also to audit and allow all claims or accounts brought against the State by any individual for quartermaster or commissary supplies, for munitions of war, for the con-

struction of fortifications and all defences and money advanced for the same, and for moneys or supplies advanced for and used by any of said troops; provided, all such claims and accounts are authenticated and approved by the acting quartermaster or commissary of the regiment, battalion or company; and in every case where any supplies or article necessary to the efficiency of the command shall have been purchased by any colonel, lieutenant-colonel of a regiment, or captain of a company and not certified to by the acting quartermaster or commissary, said colonel or lieutenant-colonel shall certify under oath that the charges are just and that such articles were purchased at the price mentioned, and were used for the benefit of said command; provided, such articles are consistent with the usage and regulations of the army with reference to the nature of the service.

"Sec. 2. In all cases provided for under the first section of this act the comptroller shall draw his warrant upon the treasurer in favor of any party whose claim or account shall have been so audited or allowed; provided, in all cases the comptroller shall have the power to examine the accounts and allow only such as are fully authenticated by proper vouchers, and to reduce extravagant charges to a reasonable amount; provided, this act shall not be so construed as to allow the payment of expenses at the camps of instruction or any troops not called into active service.

"Sec. 3. That the comptroller shall keep a separate register of all claims presented under this act and properly chargeable to the government of the Confederate States, and arrange the vouchers and accounts as directed by the laws of the State government for presentation thereto.

"Sec. 4. Be it further enacted, that the sum of three hundred thousand dollars, or so much thereof as may be necessary, be and is hereby appropriated out of any money not otherwise appropriated to carry out the provisions of this act.

"Sec 5. That this act take effect and be in force from and after its passage."

Approved January 4, 1862. *See Acts of 1862, pages 29, and 30.*

It will be seen that when the Legislature, on the 13th day of January, 1862, provided that any audited indebtedness should be receivable for these eight per cent. bonds included all the indebtedness incurred for the military defenses of the State for which warrants should be issued. Of course, the claims for military defense, authorized by the Act of 1862, would be evidenced by warrants bearing a later date, that is, bearing a date, at least as late as January 10th, 1862. This is also made clear by the Act of January 11th, 1862, which reads as follows:

"Section 1. Be it enacted by the Legislature of the State of Texas: That all the specific taxes for the object of paying interest and principal of loan shall be collected in specie currency.

"Sec. 2. The treasury warrants not bearing interest, in addition to the provision heretofore made for their reception for payment on lands, including warrants therefor, shall be receivable *as money* in the payment of taxes, office fees (including fees for patents) and land dues payable in the general land office of Texas, and all other dues to be collected for the State, or in its

name, except specific taxes for the object of paying interest and principal of loans; and except dues of sinking fund and interest on school fund loaned to railroad companies.

"Sec. 3. Treasury notes and coupons issued by the Confederate States of America shall be receivable as money for indebtedness to the State, for indebtedness to the State lands under the pre-emption laws and laws authorizing the sale of the University lands, and laws providing for the sale of the public domain in general, including certificates therefor; for office fees, including fees for patents of land, dues payable in the general land office, taxes, and all other dues to be collected for the State or any debts claimed, except specific taxes for the object of paying principal and interest of loans, and except dues of sinking fund and interest on the school fund loaned to railroad companies; and shall be receivable for taxes to be collected for the ordinary revenues of counties, without affecting their special taxes.

"Sec. 4. This act shall be in force from and after its passage."

Approved January 11, 1862. *Acts of 1862, p. 37.*

The Act last quoted made a specific provision that the non-interest bearing treasury warrants should be used for the payment of practically all indebtedness, except specific taxes levied for the purpose of paying interest and principal of loans and except sinking fund and interest on school fund loaned to railroad companies. The interest bearing warrants were not to be received for that purpose, the supposition being that there were few of them in existence, therefore, there was no necessity for making such provision, because the act authorizing the issuance of non-interest bearing warrants presupposed that the interest bearing ones would be funded in the non-interest bearing warrants. In fact, specific provision was made for their being refunded in the non-interest bearing warrants. *(See Section 2 of the Act approved January 10th, 1862.)* It seems, therefore, too clear for argument that the warrants fundable in eight per cent. bonds were issued under and by virtue of the Act of 1862. They certainly were not issued earlier than that date, because if they had been they would have been paid on presentation to the treasurer early in 1862, and if not paid would have been refunded according to the provisions of section 2 of the Act of 1862 in non-interest bearing warrants.

In 1863 the Legislature sought to give a wide field of usefulness to these warrants. In December, 1863, they passed an act, which reads as follows:

"Be it enacted by the Legislature of the State of Texas: That the comptroller of the State be and he is hereby authorized to receive from the railroad companies of this State who are indebted to the special school fund,

all interest on their bonds that may be now or hereafter become due, provided same be tendered in said bonds, or State warrants previous to the meeting of the next regular session of the State Legislature." (See Acts of the Texas Legislature, 1863, p. 37.)

On November 15th, 1864, another act was passed which reads as follows:

"That the railroad companies of this State that are indebted to the special school fund shall continue to be allowed the privilege of paying the interest due the said fund in the treasury warrants and bonds and coupons of the State; and may also discharge the whole or any part of the principal of their indebtedness to that fund in the same manner. Provided, said railroad companies shall satisfy the comptroller that the treasury warrants and bonds and coupons of the State are received by them at par with specie, for freight and passenger travel. That all treasury warrants and bonds and coupons of the State so received into the State treasury shall be cancelled, and the comptroller shall issue the bonds of the State, *bearing six per cent interest*, to the special school fund for the amount so paid in, and this act take effect from and after its passage."

Approved November 15th, 1864. *(Acts of 1864, p. 14.)*

The Act last quoted gives the court the necessary information as to the existence of the 6 per cent. bonds and of the act authorizing State warrants to be funded in the 6 per cent. bonds. This court, by an inspection of these acts, will know that those warrants with which the interest was paid under the previous acts were fundable in 8 per cent. bonds, and that all warrants received after November 15th, 1864, in payment either of the interest or principal, should be fundable in 6 per cent. bonds, hence the payments made in December and in the early spring of 1865 were fundable in six per cent. bonds.

The finding of fact by the Court of Civil Appeals to the effect that these warrants were issued after January, 1862, is abundantly supported by the evidence.

SIXTH COUNTER-PROPOSITION OF DEFENDANT IN ERROR.

*The treasury warrants in which the payments were made were issued for the purpose of being circulated as money, and were, therefore void, because issued in violation of Article 8, Section VII, of the State Constitution, as it then existed.*

STATEMENT.

The section of the State Constitution in question reads as follows:

"Sec. 8. No money shall be drawn from the treasury but in pursuance of a

appropriation made by law, nor shall any appropriation of money be made for a longer term than two years except for purposes of education; and no appropriation for private or individual purposes, or for purposes of internal improvement, shall be made without the concurrence of two-thirds of both houses of the legislature. A regular statement and account of the receipts and expenditures of all public moneys shall be published annually in such manner as shall be prescribed by law, *and in no case shall the legislature have the power to issue treasury warrants, treasury notes, or paper of any description intended to circulate as money.*

It will be noted that the above proposition involves a finding of fact as well as a legal conclusion. If considered from one standpoint it involves a finding of fact, though from another, involves only a legal conclusion. As a matter of law I insist that the conclusion stated to the effect that these warrants in question were issued for the purpose of being circulated as money, is established by the acts of the Legislature alone.

In this connection it is necessary to recur to the act of 1860, which authorized interest bearing treasury warrants to be issued. The last sentence in section 2 of that act is in these words, "*Said warrants shall not circulate as money, but may be assigned.*" It is plain, therefore, that the act of 1860 authorizing the interest bearing warrants to be issued prohibited their being circulated as money. The act of 1862 repealed the Act of 1860. The Act of 1862 is conspicuous by the fact that the inhibition against the use of warrants as money was omitted therefrom. It furthermore provided that the warrants should not be issued for the amount of indebtedness like government warrants are ordinarily issued, but that they should be of such portions of the claim as may be expressly required by the holder; provided, that not more than one-tenth of the whole amount may be warrants of one dollar each and the balance of five dollars or more each. The denomination of these warrants is quite suspicious. Neither the Federal nor State governments draw warrants of that character to meet the salary lists of the officials or employes or to pay any other indebtedness. A warrant drawn to subserve the ordinary governmental purpose would be for the amount of indebtedness, but here the holder was authorized to take ten per cent. of the whole amount of his indebtedness in warrants of one dollar each and the balance in warrants of five dollars each. The holder of the claim could dictate the denomination of the warrants. There must have been some purpose in this, besides giving to the holder the evidence of the fact that the State was indebted to him.

On the following day the Legislature passed another act, which was entitled "An act declaring what kind of bonds may be received for certain public dues," and reads as follows:

"Section 1. Be it enacted by the Legislature of the State of Texas: That all specific taxes for the objects of paying interest and principal of loans shall be collected in specie currency.

"Sec. 2. Treasury warrants, not bearing interest (in addition to the provision heretofore made for their reception in payment for lands, including certificates therefor), shall be receivable *as money* in the payment of office fees, including fees for patents and land dues payable in the general land office, taxes, and all other dues to be collected for the State, or in its name, except specific taxes for the objects of paying interest on school funds loaned to railroad companies."

On the same day the same Legislature passed another act in these words:

"Section 1. Be it enacted by the Legislature of the State of Texas: That the treasurer, and every other officer of the State, and every officer of counties, who, according to law, shall have received, as public money, treasury warrants of this State, or treasury notes of the Confederate States of America, or its coupons, shall disburse or transfer the same *as money*, at par, according to the laws providing for the disbursement or transfer of money, in the respective cases, if the person or persons entitled to have a disbursement or transfer will receive such warrants, notes and coupons as money; and officers who may be authorized to receive public money, are authorized and directed to receive such warrants, notes and coupons *as money*, except when expressly prohibited by some other law; and any officer, in making such disbursement and transfer, may adjust the balance by receiving a fractional part of the amount of any such warrant, note or coupon, in any of such funds or specie currency, in whole or in part, to be held and applied as that for which it was received, except that treasury warrants of the State, received by the treasurer thereof, shall not be re-issued. Every public receiver of such warrants, notes and coupons, on reception thereof in each case, shall give a receipt, officially subscribed, specifying the kind and amount, respectively, of the funds received; and shall keep a corresponding account showing the several kinds and amounts received, and from whom, and shall be accountable in kind, with the qualification aforesaid, for whatever he may have thus received, or, in default thereof, for the same amount of specie currency. *Any such receiver, in failing to comply with any of the foregoing requisitions, shall be deemed guilty of a misdemeanor, and on conviction thereof, he shall be punished by fine not exceeding one thousand dollars, or by imprisonment not exceeding one month, or by both fine and imprisonment as aforesaid, and may be removed from office by judgment of the court trying the case.*

"Sec. 2. This act shall be in force from its passage." (Acts of 1862, page 38.)

On the 13th day of January, 1862, another act was passed making an appropriation of $75,000 for mileage and per diem of the 9th Legislature of the State of Texas. Section 1 provides for the issu-

ance of treasury warrants therefor. Section 3 of the act is in the following language:

"Sec. 3. That in case there be no fund in the treasury, the comptroller shall draw his warrant upon the treasurer; said warrants shall be receivable for taxes and other public dues, as may be provided by general law; one-tenth of each claim may be issued, if the claimant so desire it, in one dollar warrants. For the other nine-tenths of the claim, no warrant shall be drawn of a less denomination than five dollars." (Acts of 1862, p. 55.)

On the 5th of March, 1863, the Legislature made an appropriation in the following language:

"Section 1. Be it enacted by the Legislature of the State of Texas: That the sum of six hundred thousand dollars is hereby appropriated to be distributed by the comptroller according to such regulations as he shall adopt, to the county courts of each county in the State, according to the scholastic returns and estimates for the years 1861 and 1862, taking as a basis for the distribution to those counties which have not returned their list for both years, a year for which there is a return of the county, to be administered by said county courts for the support and assistance of the widows, families and dependents of the officers and soldiers of Texans who have been or may be in the army of the Confederate States or in the active military service of the State of Texas, and which widows, families and dependents may need the support and assistance of the State." (Acts of 1863, page 13.)

On December 16th, 1863, the Legislature passed an act, among other things, providing for the taxation of money and notes. Section 2 of the act in question reads as follows:

"A tax of one-half of one per cent. shall be levied and collected in kind on all specie, treasury notes of the Confederate States of America, treasury warrants of the State of Texas and bank notes held or owned in this State and all foreign bills of exchange and certificates of deposit and other evidences of money upon deposit or secured beyond the limits of the State, owned by persons residing therein shall be known as specie and thereon shall be levied a tax of one-half of one per cent. in specie." (Acts Tex. Leg. 1863, p. 38.)

A proper construction of these several acts of the Legislature above quoted makes clear the intention of the Legislature to issue these warrants for the purpose of being circulated as money. The points so clearly shown are as follows:

1. The Act of 1860 prohibited the interest bearing warrants thereby authorized to be issued from being used as money.

2. The Act of 1862 repealing the Act of 1860, authorized the issuance of non-interest bearing warrants, but contained no prohibition against their use as money.

The denomination of the old warrant was to be fixed by the amount of indebtedness due.

The denomination of the new warrants depended in part upon the will of the holder of the claim, he being allowed to put ten per cent. of them in one dollar warrants and the remainder in warrants of five dollars each. These even numbers indicate most conclusively that they were to be used for some purpose other than as an evidence that the State was indebted to the holders thereof. The denominations indicated also, that they were for general circulation. To make clear this fact, an examination of the record only is necessary, so that the size, shape, and general appearance of these warrants may be noted. (R. .) These new warrants were not to bear interest. By an act of the same day heretofore quoted, they were made receivable for almost every kind of public dues that could be mentioned, with one or two exceptions.

The act passed by the Legislature on the following day provided that these treasury warrants should not only be received in payment of certain public debts, *but they should be received as money.*

By an act of the same day, to-wit, January 11th, 1862, State officers were required to *disburse them as money.* It required them to be treated by the officers as money. A failure so to do made the officers liable to a fine of not exceeding one thousand dollars, or by imprisonment not exceeding one month, or by both fine and imprisonment, and beside that they might be removed from office.

Later on they were made receivable for the interest on the special school fund, and still later were made receivable in payment of the principal.

Taking all these acts together no one can fail to observe that the intention of the Legislature was to furnish the country with a character of currency which was to take the place of the ordinary circulating medium, to be used for all purposes for which money could be possibly used.

This contention is strengthened by the fact that the comptroller, the accounting officer, for the fiscal years 1860 and 1861, recommended this character of financial legislation. This may be found on pages 108 and 109 of his report. He was then undertaking to outline a plan whereby the State could have a volume of currency sufficient to transact its business. On this point he said:

"There being no prospect of replenishing the treasury by a sale of State bonds,

and as the taxes of the present year will not be available before the middle of next September, it becomes highly necessary to provide means for the support of the government until that time. To thus provide and establish the par value of treasury warrants are objects worthy of the first and highest consideration.

"The entire accomplishment of these important objects would certainly result from the plan already proposed—provided only that treasury warrants be made receivable for taxes and all public dues.

"The fact that the proposed revenue will far exceed the amount of warrants to be issued will make the demand for warrants greater than the supply and render them equivalent to specie, thereby affording to the government ample means for present support, and to the people great facilities for the payment of taxes during the war, and the consequent scarcity of specie.

"No embarrassment or inconvenience can possibly result from the policy of making treasury warrants receivable for public dues; provided only that the issue of warrants is limited to the amount of revenue required which may be controlled by the legislature in making appropriations for that purpose.

"A treasury warrant is simply an order on the State treasurer to pay to the order of the party a certain amount audited in his favor.

"Should the State treasurer have no funds for the payment of warrants, an act of the legislature making them receivable for public dues, is in effect, only to authorize such other financial agent of the State as may have means to redeem the same.

"The issue of warrants, or audited scrip, may at times become necessary to meet extraordinary emergencies, or to avoid this necessity, a safety fund should be provided and retained in the treasury sufficient to meet such demands, which, indeed, would be less objectionable than to resort either to the uncertain means of borrowing money, or to the issue of warrants or scrip of any kind; yet it can not be denied that the commercial habits and necessities of the country, and the progressive and enterprising disposition of the government and people sometimes demand the use of credit in place of coin as an irresistible public necessity.

"Under no circumstances should anything but specie or audited drafts of the State treasury be made receivable for public dues. To make any other description of paper receivable for State dues to be again issued, would not only be obnoxious to law, but highly detrimental to the credit of the State.

The State being in debt, her own liabilities should be preferred to all others, and after the State debt has been paid by the issue and redemption of warrants as proposed, the revenue for the ordinary support of the government should forever be collected in specie. Should it be found necessary to continue the issue of treasury warrants, and should such measures be adopted as will preserve the par value of the same, it will be quite unnecessary to continue the issue of interest warrants, since it is manifest that the interest adds but little to the value of such issues.

"This is the only practicable method known to this office under existing circumstances by which the good faith and credit of the State may be preserved, the public debt promptly paid and available means furnished to meet the present necessities of the government." Rec. p. .)

It will be seen that the scheme outlined by the Comptroller to make the State warrants, or audited warrants, receivable for all

public dues, was adopted by the Legislature. No fiatist ever dreamed of a more perfect system than that outlined by the Comptroller. The Governor of the State adopted this view, and impressed it upon the Legislature. (R., ) That portion of his message in which he deals with this subject reads as follows:

"I consider that experience has established that treasury warrants, at the present time, can only be kept up at a just appreciation, by creating for them a general and constant demand approximating to the amount issued. The 8 per cent. bonds now outstanding on which the interest has been regularly paid, except for a short period since the first of July last, are rated in the market at 25 cents on the dollar, or less, and yet the law has been observed in discharging the interest upon them. There is much more certainty both as the proportion which the specie interest bears to the amount of these bonds, and as to the regularity of its payment than is given to the public mind in the law referred to, as to the amount of specie to be used, and the periods when to be used, in the purchase of these warrants. It follows then, that if these issues from the treasury are to be made in the future, and the credit of the State preserved, that a plan must be devised which will create for them a constant and general demand, approximating to the amount issued." (R. p. .)

Thus it will be seen that the State court correctly held that these treasury warrants were issued for the purpose of being circulated as money. The recommendations of the Comptroller, the message of the Governor, the acts of the Legislature, the form, size and denomination of the warrants, all show, and conclusively show, that these warrants were issued for that purpose. They were made fundable in State bonds for the purpose of maintaining them. By funding the warrants in bonds and paying the interest promptly, it was supposed they would be taken in all the channels of trade. But Gov. Murrah called attention in his message to fact that they had been somewhat disappointed in results, and that some other and increased use should be made for these warrants in addition to those theretofore advised. What were these increased uses? That they should be used by the railroad companies in paying the interest and principal of the large debt which they owed the State, as the Act of 1864 subsequently provided. It was supposed by the railroads agreeing to take them at par for their railroad and passenger fares it would create a larger demand for them, though there is nothing in the record to indicate that they kept that part of their contract. It is as clear as it is possible to make any question, that the entire system of legislation was for the purpose of constituting the warrants in question a circulating medium, which would answer all the purposes of money. This is just what the State Constitution said

the Legislature had no power to do. The fact that the Comptroller and the Governor recommended the legislation, could not change the Constitution. They were as much hedged in by the limitations of the organic law as the Legislature. This court has held that an invalid act of the Legislature is as inoperative as if never passed. *(Morton vs. Shelby County, 18 U. S., 426.)* Applying that rule, the conclusion cannot be avoided that these warrants issued in open defiance of the prohibitions of the State Constitution, must be held invalid, and, therefore, as never having been issued. If legally considered, it must be held that they were never issued, that is to say, that no legal warrants were ever issued; it must likewise follow that no warrants were ever paid the State of Texas on this indebtedness.

It is plain, therefore, that if this court feels at liberty to examine the facts upon which the conclusions of the State court were based, that it cannot say that the findings were unsupported by the evidence. It will be noted that they are supported by the authorities.

*Bragg vs. Tuffts, 6 S. W. Rep., 163.*
*Dively vs. The City of Cedar Falls, 21 Iowa.*

*In the case last cited the court held that the paper in question was not issued for the purpose of being circulated as money, but they added, "It is clear * * * if the obligations sued on in this case were issued for the purpose of being used and circulated as money in violation of the statute they were void and could not be the basis of a recovery."* The following cases support the same proposition:

*Thomas vs. The City of Richmond, 12 Wall., 349-357.*
*City National Bank vs. McMahon, 21 La., 751.*

That the warrants in question were issued to circulate as money cannot be doubted. If the State court had decided that they were bills of credit and void because violative of the Federal Constitution the decision would have been clearly correct. The general proposition is correctly stated in the *American and English Encyclopedia of Law, Volume 16, page 709*, in the following language:

"Certificates issued by a State receivable in payment for taxes, for fees, for salary of officers, etc., for the redemption of which the faith of the State is pledged are bills of credit within the meaning of the Constitution, although they are not made legal tender by State law."

Or, as this court has stated it:

"The term 'bill of credit' has acquired an appropriate meaning. Bills of credit signify a paper medium intended to circulate between individuals and between the government and individuals for the ordinary purposes of society * * * If the prohibition means anything; if the words are not empty sounds it must comprehend the emission of any paper medium by the State government for the purpose of common circulation." (*Craig vs. Missouri, 4 Pet., 123.*)

Another definition given by this court is as follows:

"The definition including all classes of bills of credit emitted by the colonies or State, is a paper issued by the sovereign power containing an obligation of its faith, and designed to circulate as money." (*Briscoe vs. Bank of Kentucky 11 Pet., 257.*)

Or as subsequently held by this court:

"To constitute a bill of credit within the meaning of the Constitution it must be issued by the State on the faith of the State and designed to circulate as money and must be a paper which circulates on the credit of the State and is so received and used in the ordinary business of life." (*Darrington vs. Bank of Alabama, 13 How., 12.*)

The principles above quoted were applied by this court to the case of *Poindexter vs. Greenhow, 114 U. S., 270.* They were in no sense modified, but held not to be applicable to the coupons there under consideration. But why? Because the court said:

"They (meaning coupons) are promises to pay money. Their payment and redemption is based upon the credit of the State, but they are not emitted by the State in the sense in which a government emits its treasury notes, or a bank its bank notes as a circulating medium or currency as a substitute for money."

And the court added:

"There was nothing on the face of the instrument, nor in the form, nor in the terms of the law which authorizes the issue, nor in the circumstance of creation or use as shown by the record on which to found an inference that these coupons were designed to circulate in common transactions of business as money, nor in the fact that they were so used. The only feature relied on to show such design is that they were made receivable to pay taxes and other dues to the State."

On the following page, in the same case, the court adds this language:

"From this it is argued that they obtained such a circulation from hand to hand as money as the demand for them based upon such quality would naturally give. But this falls far short of their fitness for general circulation in

the community as a representative and substitute for money, in the common transactions of business, which is necessary to bring them within the constitutional prohibition against bills of credit. * * * In this case the coupons were issued by the State of Virginia and in its name and were obligations based upon its credit, and which it had agreed, as one mode of redemption, to receive in payment of all dues to itself, in the hands of any holder; but they were not issued *as and for money*, nor was this quality impressed upon them to fit them for use as money, or with the design to facilitate their circulation as such. It was conferred, as is apparent from all the circumstances of their creation and issue, merely as an assurance by way of contract with the holder, of the certainty of their due redemption in the ordinary transactions between the State treasury and the tax payers. They do not become receivable in payment of taxes till they are due, and the design, we are bound to presume, was that they would be paid at maturity. This necessarily excludes the idea that they were intended for circulation at all."

So it will be seen that the case of *Poindexter vs. Greenhow* does not militate against the former decisions of this court, but the principles previously enunciated and reiterated in the case last mentioned were not applicable to the facts therein stated, in that this court determined that the coupons of the Virginia bonds were not issued for *the purpose of being circulated as money*. But the warrants involved in this case were issued for that purpose. The court so found, and it is respectfully submitted that the facts shown in the record abundantly support that finding. Having been issued as money they are, therefore, void, and if the State court had held they were issued in violation of the Federal Constitution alone, without reference to the State Constitution it is submitted that under the operation of the rules many times announced by this court the judgment of the State court would be approved and its decision affirmed.

Similar litigation was had in the State of Mississippi, as will be seen from the case of *New Orleans Railroad Company vs. The State*, *57 Miss., 877*; also *Thomas vs. Taylor*, *42 Miss., 651*; and *Thomas vs. Taylor*, *22 Wall., 479*. In the Mississippi cases, however, the defense seems to have been based upon the fact that the legislation therein involved was passed, and the paper issued thereunder was issued in aid of the rebellion. The State trial court based its decision in this case, in part at least, upon this proposition. The Court of Civil Appeals, to which the writ of error in this case is directed, based its decision upon the fact that the paper was issued in violation of the State Constitution and was, therefore, void. The record, however, will abundantly support each finding. No one can

examine the legislation for the particular period of Texas history and reach a conclusion, other than it was had to aid the State in the prosecution of the war between the States. That being true, it would furnish additional ground, if this court should take jurisdiction, for sustaining the court below. But it is unnecessary to elaborate this point as it is not believed to be necessarily involved in this discussion. It was insisted in the State court, and will doubtless be in this, that this was an executed contract; that is to say, that the paper was issued by the State, put in circulation, and paid by the railroad company back to the State; and, that being an executed contract this court will not interfere with it. With all due respect to the learned counsel on the other side, it must occur to any one that that is an absurdity. Who were the parties to the proposed contract said to be executed and not executory? Manifestly the State and the railroad company. The first question that necessarily arises is, did the *State* make such a contract with the railroad company? Did the *State* agree to issue warrants and agree to accept those warrants in payment of its indebtedness? How can the *State* be said to have made a contract, when by the express terms of its Constitution, it prohibited the issuance of such warrants? Does it not necessarily follow that it prohibited its State officers from accepting such warrants in payment of that or any other indebtedness? When the State prohibited the issuance of a certain character of paper intended to be circulated as money it must be presupposed that its officers would obey the constitutional prohibition. It must therefore follow, as night follows day, that if the officers obeyed the constitutional prohibition there would be no such paper to be received in payment of any debt, and therefore, it was at least, impliedly prohibited from being accepted, as the Constitution forbade the issuance of the paper. The act of the Legislature was absolutely void. The Legislature was but an agent of the State. Having been forbidden by the State, its principal, from issuing this particular kind of paper, and necessarily being forbidden from accepting such paper, because it was not supposed to exist, if the officers did issue such paper and accept it, neither their unauthorized issuance nor acceptance was the act of the State, but was an act which the State had actually prohibited. The principle is recognized that the action of an agent is the act of the principal, provided, it has been authorized by the principal; but no court has ever

held that an act of an agent, not done in pursuance of his authority, but in open violation of the limitations imposed upon that authority by the principal, bound the principal, particularly when the limitations of the agent's authority were known to those with whom he dealt. The constitutional prohibition was a public law. The railroad companies must be chargeable with notice of it; they are presumed to have known the law, therefore, when they dealt with the Legislature with respect to these matters, they dealt with that body knowing that it had no authority to issue treasury warrants to be circulated as money, or to accept those treasury warrants, the issuance of which was prohibited, in payment of a debt, because their issuance had been prohibited. It would be singular if a constitutional provision could be nullified in this way, that is to say, the people of a State in their organic capacity, in a constitutional convention, may prohibit the performance of a given act, and yet the Legislature would authorize the doing of this prohibited act; the officers of the State would execute the act of the Legislature, and then the courts would hold, that being an executed act, it was binding upon all parties, and in that way the Legislature becomes more powerful than the people, whose agents they are. They can nullify the acts of constitutional conventions by passing laws contrary to the Constitution, and having those laws executed before any controversy can arise in reference thereto. But, independent of this proposition, it is well settled, that without special authority an agent can only receive payment of the debt due his principal in legal currency of the country, or in bills which pass as money at their par value by the common consent of the community. The testimony as to these treasury warrants, by ex-Governor Lubbock, is that they were not worth more than ten cents on the dollar at the time the payments were made; that he sold his warrants representing his salary for about that sum. *(Ward vs. Smith, 7 Wall., 447-450; Morgan vs. Ball, 43 Miss., 288-292.)*

This argument also applies to the suggestion made in the State court, which will doubtless be made here, that these payments were ratified by the State Legislature in 1870. Yet, the Legislature of 1870, had no authority to issue treasury warrants for the purpose of being circulated as money. The latter part of Section 6, Article XII, of the Constitution of 1869, uses this language:

"In no case shall the Legislature have the power to issue treasury warrants, treasury notes, or paper of any description intended to circulate as money." *(Sayles' Tex. Stats., Vol. 4, p. 447.)*

It has already been shown that the Legislature had no authority when the treasury warrants in question were issued and received in the payment of this debt, to issue them. The Legislature of 1870 was hedged about by the same character of limitation. It had no authority to authorize treasury warrants to be issued for the purpose of being circulated as money. It is a familiar principle that one cannot ratify that which he could not originally authorize. Or to state it more broadly, one cannot ratify an act which he did not have the power to authorize, at the date of the attempted ratification. The Legislature, at the date of this proposed ratification in 1870, had no authority to authorize the act to be done. Not having the power to authorize the act to be done, certainly they could not approve it after it was done, and in that way give it vitality. It is equally as familiar to the legal mind that a void act is incapable of ratification by any one. An act of the Legislature passed in plain violation of a constitutional prohibition is certainly void. There can be no dispute about that. That act cannot be ratified, and it must, therefore, follow that the acts of the Texas Legislature authorizing the issuance of treasury warrants for the purpose of being circulated as money, and of other acts based on these void acts authorizing the officers to receive them in payment of debts, were likewise void and incapable of ratification by the Legislature. It is doubtful whether even a constitutional convention could ratify them, but certainly a Legislature could not.

The contention of counsel for plaintiff in error involves this absurdity that one Legislature being an agent of Texas could exceed its authority, commit an act in open violation of one of the plainest prohibitions of its Constitution, and then another Legislature some years later, hedged about by the same limitation, with no authority in excess of that with which the former Legislature was clothed, can ratify, approve and make valid the acts of the former Legislature, committed in violation of the Constitution. But reasoning on this subject is unnecessary. The Constitution of 1869 positively prohibited such ratification. Section 34 or Article XII, in so far as applicable, reads as follows:

"All debts created by the so-called State of Texas from and after the 28th day of January, 1861, and prior to the 5th day of August, 1865, were and are

null and void and the Legislature is prohibited from making any provision for the acknowledgment or payment of such debts." (*Sayles' Texas Statutes, Vol. 4, p. 465.*)

It would be impossible for the Legislature to have accepted the payment previously made in the treasury warrants issued after the 28th day of January, 1861, without acknowledging the existence of the indebtedness created during that period. The warrants represented indebtedness created not only after the 28th day of January, 1861, but after the 10th day of February, 1862. To the extent, therefore, that any legislation recognized a payment previously made, in warrants evidencing indebtedness created after 1862, even if otherwise valid, it was necessarily void. This view was taken of the question by the officers of Texas immediately after the war and the payments made in warrants were repudiated, and during Gov. Davis' administration, which was the last Republican administration, they were not admitted by either himself, or his Comptroller of Public Accounts. They have remained a charge against the railroad company on the books of the State through all the successive administrations. In other words, the invalidity of the payments have been shown to be insisted on by the State officers ever since. Recognizing these facts, the railroads have made all their payments, as the record will disclose, under protest. (R., pp. )

It is not believed necessary to discuss any other questions suggested by the record, for the reason that it is not thought they can be considered by this court. By way of recapitulation, therefore, it is suggested:

1. The real issue involved in the trial court was the validity of certain payments made in treasury warrants issued during the war between the States. The Court of Civil Appeals, to which the writ of error in this case is directed, held that those payments were invalid, and that the issuance of the particular paper in which the payments were made, was prohibited by the State Constitution, and that the officers issuing same, and accepting same in payment of the debt, acted outside the limitations of their authority, and that their acts were, therefore, void and not binding upon the State.

2. That inasmuch as the State court rested its decision wholly on the finding of fact and on the construction of the State Constitution, that this court is without jurisdiction; and that, therefore, the writ of error ought to be dismissed.

3. That while the finding of facts by the State court and the construction of the State Constitution by that court is believed to be conclusive on this court; yet if this court shall hold otherwise it is submitted that the record in this case discloses that the finding of fact, to-wit, that the warrants were issued during the war and after February, 1862, and for the purpose of being circulated as money, is abundantly sustained by the evidence, and that indeed no other conclusion could have been justly reached by the State court.

4. That even if the State court had based its decision in whole or in part upon the proposition that the warrants in question were bills of credit and were therefore void, because issued in contravention of the Federal Constitution, that its decision must be sustained under the authorities heretofore cited.

5. That inasmuch as the State Constitution forbade the issuance of the warrants in which these particular payments were made, that it impliedly forbade the acceptance of same, because it is impossible to conceive of a State officer being authorized to accept in payment of a debt paper which the State officers were prohibited from issuing, and that, therefore, neither the issuance nor acceptance of said paper was binding upon the State in any legal sense whatever.

6. That inasmuch as the issuance of the paper was void and the acceptance void, the void act was incapable of ratification by some subsequent Legislature which was but an agent of the State and clothed with no greater authority than those which attempted to authorize the issuance of these particular warrants. In other words, that one agent cannot ratify the unauthorized act of a previous agent, but if ratified at all it must be by the principal, and that it is not shown in this case that the principal, that is, the State of Texas, undertook to ratify in any sense the unauthorized act of its agent, because the Constitution of 1869, under which the Legislature of 1870 was operating, specially forbade the recognition or acknowledgment of any debts created after January 28th, 1861, and that inasmuch as these warrants were issued after February, 1862, it must follow that they were issued as representing indebtedness created after 1861, and, therefore, any attempted acknowledgment of their justness was forbidden by the positive terms of the Constitution of 1869.

7. That no agent is authorized to accept in payment of any indebtedness anything other than money which passes current at par.

and it is shown in the record in this case that these warrants at the date they were received in payment of this indebtedness were worth not more than ten cents on the dollar, therefore, in no sense, could the indebtedness be held as canceled or liquidated by the unauthorized acts of these agents in receiving paper which passed at less than par. *(Ward vs. Smith, 7 Wall., 447.)*

8. That the payments made in these treasury warrants were immediately repudiated by the State Officers, as is shown by the record in this case, and that this repudiation of these payments has been concurred in by every State administration since said date, covering a period of more than a quarter of a century.

9. That the payments made by the railroad companies recognize the fact of this repudiation in protesting against the application of any of their payments to the interest on the indebtedness which they claim had been previously paid by said warrants.

In this connection, it should be stated that it has been impossible to quote the pages of the record, for the reason that the plaintiffs in error have not had the record printed, but it is not believed that any statement made herein will be controverted by counsel for the plaintiffs in error. It is, therefore, respectfully submitted that the motion to dismiss the writ of error already on file should be granted, and if not, the case should in all things be affirmed.

M. M. CRANE, Attorney-General,
Attorney for Defendant in Error.

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JAMES H. McKENNEY

No. 306 81

Add'l Br. of Culberson for D

Filed Apr. 15, 1899.

# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1898.**

No. 306.

THE HOUSTON & TEXAS CENTRAL RAILROAD COMPANY, *Plaintiff in Error.*

vs.

THE STATE OF TEXAS, *Defendant in Error.*

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

**ADDITIONAL BRIEF ON MOTION TO DISMISS WRIT OF ERROR.**

T. S. SMITH, Attorney-General of Texas.
C. A. CULBERSON,
*Counsel for Defendant in Error.*

PRESS OF JOHN F. WORLEY, DALLAS.

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**ADDITIONAL BRIEF ON MOTION TO DISMISS WRIT OF ERROR.**

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## STATEMENT OF THE CASE.

On December 8th, 1894, the Attorney-General of Texas instituted this suit in the District Court of Travis County, Texas, in the name of the State of Texas against the plaintiff in error. It was a simple action of debt and to foreclose a lien on the railroad property to secure loans made by the State to the company under an act of the legislature of said State approved August 13th, 1856.

There was not the most remote suggestion of a Federal question in the original petition. (Record, pp. 1 to 5).

The defendant company filed a voluminous answer, in substance pleading, (1) part payment of interest and sinking fund in lawful money, and (2) payment of the balance in warrants and treasury notes of the State of Texas issued after the secession ordinance was passed and which said payment in warrants and treasury notes was authorized by several acts of the legislature enacted between 1861 and 1865. It was insisted in the answer that these several acts of the legislature, and the alleged to have been passed August 15th, 1870, constituted contracts between the State and the company which were within and entitled to the protection of Article I, Section 10, of the Constitution of the United States, to the effect that no State shall pass any law impairing the obligation of contracts, and that to disallow payment under these statutes would deprive the company of its property without due process of law in violation of the fourteenth amendment. This answer, however, did not point out any law of the State of Texas, constitutional or statutory, under which it was sought to impair the obligation of the alleged contracts or which directly or indirectly was intended to have such effect or upon which such construction had been or could be placed. (Record pp. 5 to 24).

It also appeared from the answer (Record p. 9) that by an act approved January 11th, 1862, payment of all interest and the two per cent. sinking fund due on the loans to this company was extended until the 1st day of January, 1864, or until six months after the termination of the war between the United States and the Confederate

States, so that the alleged payment in warrants and treasury notes was purely voluntary.

Under the practice in Texas the replication of the plaintiff to the answer of defendant is termed the supplemental petition and contains no part of the statement of the cause of action. (47 Texas, 616, Rules 3, 4 and 5). So much of the first supplemental petition of plaintiff, the State of Texas, as bears upon this motion alleged that the pretended payment in warrants and treasury notes was illegal and void, because:

1. The said warrants and treasury notes were issued "in aid of the rebellion."

2. The company purchased said warrants and notes in the market for a nominal sum and sought to make payment with them at par.

3. The said warrants and notes were issued for the purpose of being circulated as money in violation of the Constitution of Texas.

4. The said warrants and notes were bills of credit and inhibited by Section 10, Article I, of the Constitution of the United States. (Record pp. 24 to 29).

The defendant company filed application and bond for the removal of the cause to the Circuit Court of the United States, alleging that the first supplemental petition of plaintiff, the State of Texas, in paragraph four referred to above, showed that the cause of action was one arising under the Constitution and laws of the United States, which application was denied. (Record pp. 29 to 38).

The subsequent pleadings of the plaintiff, the State of Texas, amplified the four grounds of defense to the alleged payment in warrants and notes contained in the

first supplemental petition and in addition insisted that if defendant company be allowed any credit for said pretended payments in warrants and notes it should not exceed the cash value thereof at the time they were delivered in so-called payment. (Record pp 38 to 43).

The defendant company, in reply, plead that the State having accepted the warrants and notes was estopped to question their validity and if they were in fact and in law void and issued "in aid of the rebellion" the State was *in pari delicto* and not entitled to relief. (Record pp. 43 to 49).

Judgment for the amount sued for was rendered for the State with foreclosure of the lien; the judgment was reformed and affirmed by the Court of Civil Appeals for the Third Supreme Judicial District; the Supreme Court of the State refused a writ of error, and upon application of plaintiff in error the Chief Justice of the Court of Civil Appeals for the Third Supreme Judicial District allowed a writ of error to review the judgment. (Record pp. 73, 217, 271, 314).

The defendant company admitted in effect the cause of action of plaintiff unless the alleged payment in warrants and notes was legal, (Record pp. 96, 101, 135), and besides the question of removal, practically the only question determined by the Court of Civil Appeals was that said warrants and notes in which payment was pretended to be made were intended to circulate as money and were therefore issued in contravention of Section 8, Article VII, of the State Constitution of 1845. Whether they were issued contrary to Section 10, Article I, of the Federal Constitution was not considered. (Record pp. 213,214).

Heretofore a motion to dismiss the writ of error was filed upon the ground that this Court is without jurisdiction. It is submitted that the motion to dismiss should be granted because, (1) the application to remove was properly denied, and (2) no question arising under the Constitution or laws of the United States is otherwise presented by the record.

*First.*

It is well settled that a cause is not now removable to the Federal Courts unless the Federal question appears from the plaintiff's statement of his own cause of action

Tennessee vs. Bank, 152 U. S., 454.
Hanrick vs. Hanrick, 153 U. S., 197.
Chappell vs. Waterworks, 155 U. S., 108.
Telegraph Co. vs. Alabama, 155 U. S., 487.
Land Co. vs. Brown, 155 U. S., 488.
R. R. Co. vs. Davidson, 157 U. S., 208.
U. S. vs. Tel. Co., 159 U. S., 553.
R. R. Co. vs. Skottowe, 162 U. S., 495.
Pratt vs. Gaslight Co., 168 U. S., 258.
R. R. Co. vs. Texas, 170, U. S. 236.

Counsel for plaintiff in error, while admitting the above rule and conceding that no Federal question appears from the original petition, insist that the allegation in the first supplemental petition that the warrants and treasury notes were bills of credit and were in contravention of Section 10 Article I of the Constitution of the United States takes the case out of this rule, but this court has quite recently held otherwise. Where "the petition stated

that defendants declined to pay on the ground that the law imposing the taxes was in violation of the Constitution of the United States," the cause was held not removable, and this case is clearly within the rule because the allegation upon which the removal is asked is not in the statement of plaintiff's cause of action, but in the replication to the defense of payment.

Sawyer vs. Kochersperger, 170 U. S., 303.

The same conclusion is reached if we look to the rules of pleading in Texas, which are fully presented on pages 14 and 15 of the original brief on this motion to dismiss.

*Second.*

No question arising under the Constitution or laws of the United States is otherwise presented by the record.

It will be remembered that the answer of defendant company sought to raise Federal questions: (1) by alleging that certain acts of the legislature of Texas passed between 1861 and 1865 authorizing the payment of interest and sinking fund on the loans to said company in State warrants and treasury notes, and ~~the~~ acts alleged to have been passed August 15, 1870, purporting in effect to ratify said payment, constituted contracts between the State and the company which were within and entitled to the protection of Article I, Section 10 of the Constitution of the United States to the effect that no State shall pass any law impairing the obligation of contracts; and (2) that to disregard the alleged payment in warrants and notes would deprive the company of its property without due process of law, in contravention of the fourteenth amendment to the Federal Constitution. (Record pp. 12, 13, 14,

20, 21.) When the case reached the Court of Civil Appeals *it was not assigned as error that the District Court refused to give effect to these contentions, in violation of these Constitutional provisions*, and consequently they were waived and abandoned. (Record pp. 191 to 203). It is true these contentions, after having been thus abandoned, were attempted to be renewed in the motion for a rehearing in the Court of Civil Appeals (Record p. 234) but they came too late.

Brown vs. Colorado, 106 U. S., 95.
Boom Co. vs. Boom Co., 110 U. S., 59.
Spies vs. Illinois, 123 U. S., 181.
R. R. Co. vs. R. R. Co., 137 U. S., 48.
Caldwell vs. Texas, 137 U. S., 698.

In abundance of caution, however, they will be traced through the record and fully considered.

In the petition for writ of error to the Court of Civil Appeals (Record p. 258) and in the motion for a rehearing thereon (Record pp. 281, 282) the two Federal questions are again presented. In the application for a writ of error to review the judgment in this Court there is a general averment in the language of Section 709, Revised Statutes of the United States (Record p. 295) and specific allegations (Record pp. 301, 302, 309, 310, 313) covering the same two Federal questions which appeared in the answer and other pleadings named. So much of the assignment of errors in this Court as affects the question is as follows:

"THIRD.

"The said Court of Civil Appeals erred in deciding against the validity of an authority exercised under the United States drawn in question in this cause.

"FOURTH.

"The said Court of Civil Appeals erred in deciding against the title, right, privilege, and immunity specially set up and claimed by said plaintiffs in error under the Constitution and statutes of and authority exercised under the United States.

"FIFTH.

"The said Court of Civil Appeals erred in deciding in favor of the validity of statutes of and authority exercised under the State of Texas drawn in question in this cause on the ground of their being repugnant to the Constitution and laws of the United States.

"SIXTH.

"The said Court of Civil Appeals erred in giving validity to the provisions of the Constitution of Texas adopted in 1869 and the Statute of Texas, approved August 13, 1870, drawn in question in this cause under a construction thereof, which impaired the obligation of the contract entered into between the State of Texas and the railway companies under which plaintiff in error, Houston & Texas Central Railroad Company, claims under and by virtue of the provisions of the acts of the legislature of the State of Texas approved February 9, 1861, December 16, 1863, May 28, 1864, and November 15, 1864.

"SEVENTH.

"The said Court of Civil Appeals erred in giving effect to the Constitution of Texas adopted in 1869 and the statute of Texas approved August 13, 1870, as impairing the obligation of the contract provision entered into between the State of Texas and the railway companies under which plaintiff in error, Houston & Texas Central Railroad Company, claims under and by virtue of the acts of said State approved February 9, 1861, December 16, 1863, May 28, 1864, and November 15, 1864.

"EIGHTH.

"The said Court of Civil Appeals erred in sustaining the validity of the authority exercised under the State of Texas by the Governor and Comptroller thereof in canceling and discharging credits for payments made under and in accordance with the provisions of the acts of the legislature of Texas approved February 9, 1861, December 16, 1863, May 28, 1864, and November 15, 1864, drawn in question in this cause on the ground of its being repugnant to the Constitution and laws of the United States.

"NINTH.

"The said Court of Civil Appeals erred in affirming the validity of the action of the State of Texas through the Governor and Comptroller in canceling and discharging credits given for payments made by the railway companies under which plaintiff in error, Houston & Texas Central Railroad Company, claims under and in accordance with the said acts of February 9, 1861, December 16, 1863, May 28, 1864, and November 15, 1864, whereby said plain-

tiff in error was deprived of its property without due process of law, contrary to the Constitution of the United States.

"TENTH.

"The said Court of Civil Appeals erred in deciding in favor of the validity of the action of the State of Texas, which, if held valid, deprived said plaintiff in error of property without due process of law.

"ELEVENTH.

"The said Court of Civil Appeals erred in sustaining the action of the State of Texas in depriving said plaintiff in error of property, to-wit: valid treasury warrants issued under authority of said State of Texas, without due process of law by taking such private property for public uses without compensation therefor." (Record pp. 290, 291, 292).

Assuming, as we are authorized to do, that the Federal questions relied upon are those specified in this assignment of errors, they will be considered with some additional propositions.

1. The third, fourth, fifth and tenth grounds are too vague and indefinite for consideration.

Lawler vs. Walker, 14 How., 149.
Maxwell vs. Newbold, 18 How., 511.
Messenger vs. Mason, 10 Wall., 507.

2. The eleventh ground, besides being vague and indefinite, is without merit because the fifth amendment is restrictive of Federal authority only.

Withers vs. Buckley, 20 How., 84.

3. It is matter of astonishment that the sixth and seventh grounds should be presented. The plaintiff in error, in its answer, and as otherwise pointed out herein, insisted that it was authorized to make payments in warrants and notes under the acts of February 9, 1861, December 16, 1863, May 28, 1864, and November 15, 1864. It also insisted that this right was confirmed, not denied, by the acts alleged to have been passed August 15, 1870 (Rec. pp. 15 and 16). The Court of Civil Appeals held (Record pp. 213, 214) that the acts of 1861, 1863 and 1864, above mentioned, which authorized the issuance of warrants to circulate as money, were in violation of Section 8, Article VII of the State Constitution of 1845, which declared that "in no case shall the legislature have the power to issue treasury warrants, treasury notes, or paper of any description intended to circulate as money." The validity of these acts, tested by the Constitution of 1869, was neither considered nor decided by the Court. Nor was it held, as the assignment of errors assumes, that the acts of August 15, 1870, were in conflict with the acts of 1861, 1863 and 1864. In considering the contention of plaintiff in error that the acts of 1870 ratified the previous legislation the Court held that they could not be given that effect (Record p. 215) because the Constitution of 1869 contained a similar provision to the Constitution of 1845 against the issuance of warrants and notes intended to circulate as money. But

manifestly this does not raise a Federal question, inasmuch as legislation subsequent to the acts of 1861, 1863 and 1864 was not the basis of the judgment as to them, but as to these the basis was the Constitution of 1845, and as to the act of 1870 it was the Constitutions of 1866 and 1869.

Palmer vs. Marston, 14 Wall., 10.
Bacon vs. Texas, 163 U. S., 216.
Waterworks vs. Sugar Co., 125 U. S., 15.

4. It is evident that under the eighth and ninth grounds in the assignment of errors an effort is made to obscure and distort the proceedings in order to give this Court apparent jurisdiction. It should be a sufficient answer to the eighth ground that the Court of Civil Appeals did not sustain the authority exercised under the State of Texas by the Governor and Comptroller, but simply declared that the alleged payments were nullities (10 Wallace, 540); the Governor or Comptroller is not "an authority exercised under any State" within the meaning of Section 709 Revised Statutes (Bethell vs. Demaret, 10 Wallace, 537); and the Federal Constitution is not aimed at individual but State legislative action (Waterworks vs. Sugar Co., 125 U. S., 30); and to the ninth ground, that there has been and will be no deprivation of property except by the decree herein which is due process of law. But let us measure these grounds by Section 709, Revised Statutes of the United States, under which alone this Court can take jurisdiction, said section being as follows:

"A final judgment or decree in any suit in the highest Court of a State, in which a decision in the suit could be

had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity; or where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed, by either party, under such Constitution, treaty, statute, commission, or authority, may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error."

Obviously jurisdiction does not attach under the first clause of this section as there was not drawn in question the validity of any treaty or statute of or authority exercised under the United States. Nor does the second clause give jurisdiction because while there was drawn in question a statute of and an authority exercised under the State of Texas, on the ground of their repugnance to the Constitution of the United States, namely, the acts of 1861, 1863 and 1864, yet no decision was rendered upon the point much less "in favor of their validity."

Bank vs. Griffith, 14 Pet., 56.
Walker vs. Taylor, 5 How., 64.

Is any title, right, privilege, or immunity claimed under the Constitution or any treaty or statute or commission held or authority exercised under, the United States, which will give this Court jurisdiction under the third clause of this section? By the assignment of errors it is

attempted to bring the case within the fourteenth amendment by alleging that the clerical act of the Comptroller under the direction of the Governor in re-stating the account was a deprivation of property without due process of law, but manifestly this could have no such effect and cannot be taken seriously. Aside from this, beneath the thin disguise of the pleader, it is evident that no right, title, privilege or immunity under the Federal Constitution is claimed or can in good faith be claimed. The right to pay the debt in State warrants and notes, which is the only right in controversy, arises, if at all, under the laws of the State, and not under the Federal Constitution. This Court in determining its jurisdiction will look beyond the mere language of the pleadings to the real character and source of the right asserted.

R. R. Co. vs. California, 118 U. S., 113.

5. Stripped of mere verbiage the contention of plaintiff in error is that this Court has jurisdiction because the Court of Civil Appeals refused to give effect to the supposed contract or because its judgment in its effect impairs the obligation of such contract. It has been clearly shown that no Federal question was decided or was necessary to be decided; that the decision was based wholly upon the ground that the warrants and notes in which payment of the debt sued on purports to have been made were issued in violation of the State Constitution; that this is purely a question of State law; and under all the authorities this Court is without jurisdiction.

Knox vs. Bank, 12 Wall., 379.

Klinger vs. Missouri, 13 Wall., 263.

McManus vs. O'Sullivan, 91 U. S., 579.
Bolling vs. Lersner, 91 U. S., 594.
Crossley vs. New Orleans, 108 U. S., 105.
Waterworks vs. Sugar Co., 125 U. S., 30.
DeSassure vs. Gaillard, 127 U. S., 234.
Morley vs. R. R. Co., 146 U. S., 171.
Bacon vs. Texas, 163 U. S., 216.

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